United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

6918

BRIEF IN FORMA PAUPERIS FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,109

UNITED STATES OF AMERICA
APPELLEE

v.

WILLIAM A. SHUMATE
APPELLANT

APPEAL FROM A CRIMINAL CONVICTION IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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(Appointed by this Court)

STATEMENT OF QUESTIONS PRESENTED

I. WHETHER IT WAS REVERSIBLE ERROR FOR THE TRIAL JUDGE TO ALLOW THE PROSECUTION, OVER DEFENSE OBJECTION, TO QUESTION AND ELICIT FROM THE DEFENDANT THE FACT THAT AT THE TIME THE ALLEGED CRIMES WERE COMMITTED THE DEFENDANT WAS ABSENT WITHOUT LEAVE FROM THE MILITARY? FURTHER, WAS IT PLAIN ERROR FOR THE TRIAL JUDGE TO FAIL TO INSTRUCT THE JURY ON THE LIMITED CONSIDERATION THEY MIGHT GIVE THIS EVIDENCE CONCERNING THE DEFENDANT'S AWOL STATUS?

(THIS CASE HAS NOT PREVIOUSLY BEEN BEFORE THIS COURT.)

REFERENCES AND RULINGS NONE

INDEX

TABLE OF AUTHORITIES

Authorities principally relied on are marked with an asterisk.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,109

WILLIAM A. SHUMATE,
Appellant

v.

UNITED STATES OF AMERICA,
Appellee

APPEAL FROM A CRIMINAL CONVICTION IN THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF IN FORMA PAUPERIS

JURISDICTIONAL STATEMENT

On June 12, 1968, appellant William A. Shumate (along with appellant Robert L. McMillan, No. 23,110) was indicted for first degree burglary, robbery, and two counts of assault with a dangerous weapon. On February 4, 1969, appellant Shumate was convicted by a jury on all counts, Judge Leonard P. Walsh, presiding. On March 21, 1969, appellant Shumate was sentenced by Judge Walsh to ten (10) years under the provisions of the Youth Correction Act, 18 U.S.C. § 5010(c). The jurisdiction of this Court is invoked under 28 U.S.C. § 1291.

Appellant William A. Shumate was charged in a four-count indictment on June 12, 1968, with having committed the offenses of first degree burglary, robbery, and two counts of assault with a dangerous weapon, alleged to have occurred on or about May 12, 1963. The government put on six witnesses in their case in chief and four witnesses in rebuttal. Appellant Shumate was the sole defense witness, with the exception of a Horton employee who identified some clothing and a bus ticket.

Maywood Smith testified he had been living at 1002 K Street, ... on May 11 and 12, 1963, where he was "bootlegging," and that on May 11 appellant Shumate and McMillan had come to his apartment at 11 A.M., and on May 12 at 1 A.M., 3 A.M., and 6 A.M. On the first three occasions the two purchased one bottle of whiskey each time, and on the last occasion they entered with a third individual, "knocked on the door and pushed it open and walked right in." (Tr. 44) McMillan ordered two half pints of whiskey and when Smith's common law wife returned from the kitchen with the bottles McMillan put a knife to Smith's neck and said "Give me your money or I'll kill you." (Tr. 43) Appellant Shumate twisted the arm of Smith's wife and then McMillan went into the pocket of Smith and took Smith's gun, firing it at the floor, then holding the gun on Smith and telling Smith he would blow Smith's brains out if Smith didn't give McMillan all his money. (Tr. 45-46) After being given about

[illegible] the intruders left and [illegible]ith watched the[illegible] go to 11th [illegible]treet and head toward the bus station. [illegible]ith called the police and when they arrived searched for the intruders at the bus station without success. (Tr. 45-48)

[illegible]mith testified that around 11 a.m. the next day a[illegible]r. Tisdale, a friend of [illegible]mith's, came running up to Smith's apartment and conversed with Smith, and then Smith went to the Safeway lunch on [illegible] Street where he observed two men walking down the street who had robbed him the night before, who were appellant Shumate and [illegible]cMillan. (Tr. 50)

[illegible]etty [illegible]oberson testified that on [illegible]ay 12, 1968, she resided above the apartment occupied by [illegible]aywood [illegible]mith, and that in the early morning hours on that date she heard two shots fired which sounded as though they came from the basement. She went to the window and saw three men run out of the basement, one of them wearing a white trench coat. (Tr. 119-20)

[illegible]ettie [illegible]. [illegible]owell, common law wife of Smith, testified that three men entered the apartment in the early morning hours of [illegible]ay 12, one of them being appellant Shumate and the other [illegible]cMillan. Shumate grabbed her and [illegible]cMillan asked Smith for money, took a gun from Smith, and fired it twice over Smith's head. (Tr. 125) [illegible]iss [illegible]owell described the lighting as one dim light in the kitchen, one dim light in the ceiling, and a larger light by the bed, and she stated that when she entered the kitchen she turned on a larger

light there. (Tr. 128-30) She described the intruders as two Negroes and one white, (Tr. 126) in contrast to the testimony given by her common law husband Haywood Smith that there were two whites and one Negro. (Tr. 44)

Officer Jimmie A. Sherl testified that he received a run for a disorder at the Safeway Restaurant on May 12, 1969. (Tr. 172) Upon arriving at the premises he conversed with Shumate and McMillan, the latter informing him that he had laid his trench coat on a bar stool to go outside to pay a taxi, and upon returning discovered his billfold with $100.00 and a pistol had been stolen. (Tr. 173) A short time later Haywood Smith identified the men as the two who had robbed him earlier that day. (Tr. 176)

Officer Peter S. Laterno testified that about 12:48 P.M. on May 12 he received a radio run for disorderlies at Safeway Lunch where he was informed by McMillan that approximately $100.00 and a .25 automatic pistol had been stolen from McMillan. (Tr. 158-62) After a conversation Shumate and McMillan walked away and Laterno was approached by Haywood Smith who then identified both individuals as the men who had robbed him earlier. (Tr. 163) Following the testimony of the officers the government rested. (Tr. 184)

Appellant Shumate called Jessie Curtis, aid to the superintendent at Lorton Reformatory, who testified regarding certain clothing worn by Shumate when arrested and that Shumate had a bus ticket in his wallet when

arrested. (Tr. 192-99)

Shumate took the stand on his own behalf. In response to an initial question regarding his employment he replied that he was a private in the Army, Fort Lee, Virginia. (Tr. 213-14) Shumate stated that on May 11, 1968, about 7:30 or 8:00 P.M. he had boarded a bus in Burlington, North Carolina and that he was heading for York, Pennsylvania. Shumate stated that he arrived in Washington about 2 A.M. on May 12, and discovered upon arrival that the next bus leaving for York was at 10 or 10:30 A.M. so he got a cup of coffee and then went to sleep in a chair, waking around 6:30 or 7:00 A.M. A short time later he observed McMillan getting off a bus, thought he knew him, and struck up a conversation with him. (Tr. 213-14: 221-22) They had a cup of coffee and then went to Safeway Lunch to get a beer where McMillan laid his coat on a stool, and upon returning from paying the taxi found his wallet missing. (Tr. 221-23) Shumate and McMillan raised a "rukus" and after conversing with police about the incident, walked toward the bus terminal and were arrested. (Tr. 222-24)

On cross-examination Shumate was questioned concerning his prior testimony about being in the Army at Fort Lee. When asked whether or not he had been stationed at Fort Belvoir, Shumate answered that he had, and that he had left that post on May 5, 1968, with thirty days leave. (Tr. 229-30) At this juncture defense counsel objected, noting

at the bench that "I think we are getting to a point where it may come out that Mr. Shumate was AWOL in the Army at this time and in effect I don't want this before the jury," stating that he considered this an impeachment. (Tr. 230-31) After a discussion between counsel and the judge, the trial judge ruled that the prosecution could properly inquire into the matter. (Tr. 231-33) The prosecutor then proceeded to elicit from Shumate the fact that he had been stationed at Fort Lee, "TDY, temporary duty" at Fort Belvoir and that he had left Fort Belvoir without authorization. (Tr. 236-40) Following Shumate's testimony the defense rested. (Tr. 291)

Defendant McMillan then presented his case, and on rebuttal the government produced Robert Petrie, United States Army, who produced the records of appellant Shumate which revealed that on April 16, 1968, Shumate had been stationed at Fort Belvoir and after that date he had no longer been at Fort Belvoir, having left on that date. (Tr. 403-04) Sergeant Allen E. Richards, Metropolitan Police, testified he booked Shumate in the cellblock on May 12 at 1:40 P.M. (Tr. 408) and Officers Sherl and Paterno testified once again.

SUMMARY OF ARGUMENT

I. IT WAS REVERSIBLE ERROR FOR THE TRIAL JUDGE TO ALLOW THE PROSECUTION, OVER DEFENSE OBJECTION, TO QUESTION AND ELICIT FROM THE DEFENDANT THE FACT THAT AT THE TIME

THE ALLEGED CRIMES WERE COMMITTED THE DEFENDANT WAS ABSENT WITHOUT LEAVE FROM THE MILITARY. THIS FACT WAS IRRELEVANT, HIGHLY PREJUDICIAL, AND PLAIN ERROR SINCE THE TRIAL JUDGE FAILED TO GIVE LIMITING INSTRUCTIONS TO THE JURY ON THE CONSIDERATION THEY MIGHT GIVE TO THE EVIDENCE CONCERNING THE DEFENDANT'S AWOL STATUS.

STATUTE AND RULE INVOLVED

14 D.C. Code § 305

"A person is not incompetent to testify, in either civil or criminal proceedings, by reason of his having been convicted of crime. The fact of conviction may be given in evidence to affect his credibility as a witness, either upon the cross-examination of the witness or by evidence aliunde; and the party cross-examining him is not bound by his answers as to such matters. To prove the conviction of crime the certificate, under seal, of the clerk of the court wherein proceedings containing the conviction and for what cause, is sufficient."

Rule 52, Federal Rules of Criminal Procedure

"(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting

substantial rights may be noticed although they were not brought to the attention of the court."

ARGUMENT

I. IT WAS REVERSIBLE ERROR FOR THE TRIAL JUDGE TO ALLOW THE PROSECUTION, OVER DEFENSE OBJECTION, TO QUESTION AND ELICIT FROM THE DEFENDANT THE FACT THAT AT THE TIME THE ALLEGED CRIMES WERE COMMITTED THE DEFENDANT WAS ABSENT WITHOUT LEAVE FROM THE MILITARY. THIS FACT WAS IRRELEVANT, HIGHLY PREJUDICIAL, AND PLAIN ERROR SINCE THE TRIAL JUDGE FAILED TO GIVE LIMITING INSTRUCTIONS TO THE JURY ON THE CONSIDERATION THEY MIGHT GIVE TO THE EVIDENCE CONCERNING THE DEFENDANT'S AWOL STATUS.

(With respect to this Argument appellant desires the Court to read pages 213 through 291 and 403 through 405 of the transcript.)

Although a defendant who takes the stand may be impeached by his prior criminal convictions, 14 D.C. Code § 305; Luck v. United States, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965), generally prior bad acts not the subject of a conviction may not be utilized for the purpose of impeaching a defendant. Fenwick v. United States, 102 U.S. App. D.C. 212, 252 F.2d 124 (1958). There are decisions which support the proposition that certain types of

conduct or activities may be inquired into even though not the subject of a conviction where there is reason to believe that such conduct or activity might have affected the witness's competency and capacity to observe, remember and recall. See United States v. Kearney, No. 22,411 (August 15, 1969) p. 7 and n. 5 of slip opinion. As to the issue of whether evidence of drug addiction may be brought out to attack the credibility of a witness, the Kearney opinion at footnote 6 notes that there is a split of authority.

On the question of whether or not a witness may be impeached by bringing out that in the past he was absent without leave from the military the authorities seem to be in accord that this type of impeachment is improper. In Commonwealth v. Spare, 353 Mass. 263, 230 N.E.2d 798 (1967) the court held it was reversible error to permit cross-examination of a defendant regarding his AWOL status at the time of the alleged rape for which he was on trial even though the defendant took the stand in uniform and the judge instructed the jury that such evidence was to be limited to the issue of the defendant's credibility. The court's reasoning was that

> The effect of permitting cross-examination of Spare on his military status (at least beyond the bare fact of the reason given by him for his use of an assumed name) was to introduce and emphasize evidence, possibly highly prejudicial, that he was guilty of an offense of which he had not been

> convicted and which had no bearing on his guilt or innocence of rape. [citations omitted] The evidence was not admissible to affect Spare's credibility. [citations omitted]

In United States v. Tomaiolo, 249 F.2d 375 (2d Cir. 1967) the court held it was improper to cross-examine the defendant regarding the fact that he had twice been convicted for being absent without leave while in the military. The court ruled that the cross-examination regarding the AWOL convictions was improper despite the fact that on direct examination the defendant had testified that he had served in the Army for three years, had been honorably discharged, and had purchased a home on the G.I. mortgage. The court reasoned that the AWOL convictions were not inconsistent with his honorable discharge and that such convictions were for a breach of military discipline which was not a felony nor did it involve moral turpitude. accord, Henderson v. United States, 202 F.2d 400 (6th Cir. 1953) which held that cross-examination should be limited to showing convictions for felonies or crimes involving moral turpitude, and it was error to admit evidence of the defendant's 27 year old court-martials for being AWOL. 3 Wharton, Criminal Evidence § 939, p. 375 (12th ed. 1955 & Supp. 1969) states the rule this way:

> Conviction by court-martial of a military offense or imprisonment for breach of military discipline involve no moral turpitude and cannot be shown to affect a witness' credibility. But the court-martial conviction may be shown for such purpose if based upon an act which would be a penitentiary offense. [citations omitted]

There is further authority which states it is improper to allow impeachment of a witness with a bad conduct discharge from the military, Rhea v. State, 208 Tenn. 559, 347 S.W.2d 486 (1961) or with the fact that a witness was imprisoned while in the military, People v. Joyce, 233 N.Y. 61, 134 N.E. 836 (1922), that while in the military the witness requested to be discharged, Smith v. United States, 283 F.2d 16 (6th Cir. 1960), and even that the witness was convicted by court-martial of desertion, Aidkiff v. State, 29 Ariz. 523, 243 Pac. 601 (1926). Contra, Nelson v. State, 35 Ala. App. 179, 44 So.2d 802 (1950) (desertion in time of war involving 6 year sentence); Jordan v. State, 141 Ark. 504, 217 S.W. 788 (1920) (court-martial conviction of desertion).

In the instant case the prosecution impeached the defendant by questioning him regarding the fact that at the time of the alleged robbery the defendant was absent without leave from the military. On direct examination the defendant had given testimony in support of his defense of alibi, stating that he boarded a bus in Burlington, North Carolina at 7:30 or 8:00 P.M. on May 11, 1968, arriving in Washington at 2:00 A.M. the following morning. During a layover for a bus which was to carry him to York, Pennsylvania the defendant slept in the bus station. Defendant testified he awoke around 6:30 or 7:00

A.M. and a short time later saw co-defendant McMillan and thinking he knew him began a conversation with him. Both got coffee and then left the bus terminal to get a beer. At the Safeway lunch McMillan laid his coat on a stool and upon discovering a short time later that $100.00 was missing from his coat both Shumate and McMillan spoke to the police and then left to walk back to the terminal. They were arrested en route. (Tr. 214-24)

On direct examination Shumate had been asked his name and employment and had "William Arnold Shumate, Private, United States Army, Headquarters, Special Troop, Fort, Lee, Virginia." (Tr. 213-14) On cross-examination the prosecution asked the defendant shether he had ever been stationed at Fort Belvoir, and the defendant answered that he had been stationed there and had left on May 5 with thirty days leave. (Tr. 229-30) At this juncture defense counsel objected, noting at the bench that "I think we are getting to a point where it may come out that Mr. Shumate was AWOL in the Army at this time and in effect I don't want this before the jury," adding that he considered such evidence an impeachment. (Tr. 230-31) The trial judge stated: "The Court feels that it is very relevant on the defense alibi, that he is not here. The point is he came in at 2:00 in the morning on the date in question." (Tr. 232) The trial judge then added: "The Court is concerned and I am certain that the jury is concerned that he is not in

uniform, is he?" (Tr. 232) Defense counsel replied that present regulations did not require it. The Trial judge went on: "But the point is I think it should be brought out he doesn't have to be. He has already said to the jury I am in the Army. I am stationed at Fort Lee. Certainly in cross-examination, the counsel for the prosecution can ascertain whether he was on duty."

MR. CAPUTY: Now I find out he is at Fort Belvoir, see?

MR. WINTER: My main contention is I this this what he is going to do which I think is irrelevant to the case whether a man is on leave, AWOL I guess you call it, has nothing to do with the case except it will show him in a bad light to the jury and I think this is what Mr. Caputy is attempting to do, and I don't think it has anything to do with this case.

THE COURT: I don't think I make myself clear. That the defense's alibi, do you follow me, now the whereabouts, the activities is all relevant in the question of alibi.

MR. CAPUTY: On this question of credibility, if Your Honor please, this is all pertinent. (Tr. 232-33)

Following the ruling of the trial judge the prosecution proceeded to elicit from the defendant that the defendant had been stationed at Fort Lee, "TDY, temporary duty" at Fort Belvoir and that the defendant left Fort Belvoir without authorization. around May 1 or 3, 1968. (Tr. 236-39)

A. CROSS-EXAMINATION OF THE DEFENDANT CONCERNING THE FACT THAT HE WAS ABSENT WITHOUT LEAVE AT THE TIME OF THE ALLEGED CRIME WAS IRRELEVANT AND IMPROPER.

The general rule is that it is improper to impeach a witness by showing that he had been absent without leave while in the military, even when this offense was supported by a conviction. (See authorities cited on 9-11, supra) Further, the facts in the instant case do not serve to alter that rule.

1. Although the trial judge indicated that the defendant's AWOL status at the time of the crime was relevant in light of the defense alibi, this reasoning does not appear to be supported by the record. The prosecution witnesses testified that the robbery occurred at approximately 6 A.M., on May 12, and that the intruders had entered the premises to purchase whiskey at 11 P.M., 1 A.M., and 3 A.M. The defendant's alibi was that he boarded a bus in Burlington, North Carolina at 7:30 or 8:00 P.M. on May 11, disembarked about 2:00 A.M. in Washington and slept in the bus station until 6:30 or 7:00 A.M. Certainly the AWOL status of the defendant at the time of the crime could not be argued to be conduct that would affect the witness's competency and capacity to observe, remember and recall. See United States v. Kearney, No. 22,411 (August 15, 1969). If the trial judge meant that the defendant's AWOL status at the time of the robbery was relevant on the issue of the defendant's credibility, the

court decisions set out 8-11 of this brief hold that such evidence is not relevant to credibility, particularly when not supported by a conviction.

2. The fact that on direct examination in response to a question the defendant stated that he was a private in the Army at Fort Lee, Virginia did not open the door for an examination of the defendant's Army record. In United States v. Tomaiolo, 249 F.2d 683 (2d Cir. 1957) the Court in a similar situation held that where a defendant testified that he had served in the Army for three years, had been honorably discharged, and purchased a home under the G.I. mortgage this did not open the door to questioning of the defendant concerning his two convictions for AWOL while in the Army.

3. The fact that on cross-examination the defendant stated that on or before May 5 he had been stationed at Fort Belvoir and left that base on May 5 with thirty days leave did not justify cross-examination on of the defendant on his AWOL status, although the trial judge indicated due to the fact that the defendant had indicated he was in the Army stationed at Fort Lee, "Certainly in cross-examination, the counsel for the prosecution can ascertain whether he was on duty." (Tr. 232) Despite the the testimony given by the defendant concerning the thirty day leave, it was improper to cross-examine on the defendant's AWOL status in this situation just as it would be improper to cross-examine a defendant regarding a misdemeanor conviction after the

prosecution had asked the defendant if he had ever been convicted of a misdemeanor and the defendant responded in the negative. Absent special circumstances, not present in the instant case, it is irrelevant whether or not an accused absented himself without leave from the military, and cross-examination on the subject is improper.

B. PERMITTING THE PROSECUTION TO CROSS-EXAMINE THE DEFENDANT ON HIS PRIOR STATUS AT THE TIME OF THE CRIME WAS HIGHLY PREJUDICIAL.

Implicit in the Luck-Gordon (Luck v. United States, 121 U.S. App. D.C. 151, 348 F.2d 163 (1965); Gordon v. United States, 127 U.S. App. D.C. 343, 383 F.2d 936 (1967)) line of decisions is the recognition of the danger of prejudice flowing from evidence of prior criminal convictions. See H. Kalven, jr. & H. Zeisel, The American Jury (1967) which reports at page 179 that when evidence of prior convictions was admitted to impeach the credibility of a defendant, the jury utilized the evidence in assessing the credibility and guilt of the defendant.

> The jury's broad rule of thumb here, presumably, is that as a matter of human experience it is especially unlikely that a person with no prior record will commit a serious crime, and that this is relevant to evaluating his testimony when he denies his guilt on the stand.

See also comment to Rule 106, Model Code of Evidence.

The risk is not only that the jury will utilize the prior conviction in making a determination of guilt or innocence, but also that the prior conviction will serve to portray the defendant as a "bad man" who ought to be

incarcerated for the good of the community. The instant case did not invoove a prior conviction, but the evidence elicited from the defendant on cross-examination concerning his AWOL status at the time of the alleged crime was just as damaging as evidence of a prior conviction.

> C. IT WAS ERROR FOR THE COURT TO PERMIT CROSS-EXAMINATION REGARDING THE DEFENDANT'S AWOL STATUS AT THE TIME OF THE CRIME, AND IT WAS PLAIN ERROR FOR THE COURT TO FAIL TO INSTRUCT THE JURY THAT THE EVIDENCE OF THE AWOL STATUS OF THE DEFENDANT WAS TO BE CONSIDERED BY THE JURY ONLY IN ASSESSING THE CREDIBILITY OF THE DEFENDANT.

For the reasons stated above the trial judge erred in allowing the prosecutor to question the defendant regarding his AWOL status at the time of the crime. This error was compounded, however, when the trial judge failed to instruct the jury on the limited consideration they could give the AWOL evidence. It is fundamental to the Luck-Gordon line of cases involving the admissibility of prior convictions that it is incumbent upon the trial judge to give limiting jury instructions.

Bruton v. United States, 391 U.S. 123 (1968) recognized at page 135 that

> [T]here are some contexts in which the risk that the jury will not, or cannot follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations cannot be ignored.

In Weaver v. United States, 408 F.2d 1269, cert. denied, 37 U.S.L.W. 3451 (1969) left open the question as to whether or not 14 D.C. Code § 305 was unconstitutional under the

Bruton doctrine, noting that it could be possible that instructions to the jury to limit their consideration of prior convictions to the issue of credibility might be inadequate. Certainly it would follow that the failure of a trial judge to give any limiting jury instructions on the AWOL evidence elicited in the instant case was plain error affecting substantial rights under Rule 52 of the Federal Rules of Criminal Procedure.

CONCLUSION

WHEREFORE, appellant respectfully requests that the conviction entered against appellant be reversed.

Respectfully submitted,

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(Appointed by this Court)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief for Appellant was hand-delivered to the Office of the United States Attorney, U.S. Court House, Washington, D.C. on this 17th day of September, 1969.

Raymond W. Russell